IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION.

COMPANY PETITION No.409/2006.

Kishore Kumar Sahoo Sole
Proprietor of M/s. Smruti
Enterprises ..Petitioner.

V/s.

Lafarge India Ltd. ..Respondent.

Mr Gautam Ankhad i/b Ashwin Ankhad & Associate
for the Petitioner.

Mr V. R. Dhond i/b Negandhi Shah &
Himatullah for the Respondent.

CORAM: V.C. DAGA,J.

DATED: 14TH FEBRUARY,2007.

P.C.:-

1. Heard the learned counsel for the rival parties. Perused petition and counter affidavit.

2. The petitioner herein has invoked the jurisdiction of this Court under Sections 433, 434 read with Section 439 of the Companies Act, 1956 to seek winding up of the respondent-company contending that the petitioner has to recover an amount of Rs. 37,74,648.00 as per the particulars of claim incorporated in Exh.B towards wharfage and godown rent payable by the respondent for the

period February, 2003 to December, 2004.

3. The petitioner claims to have served a statutory notice dated 7th April, 2006 under Section 434 of the Companies Act,1956 to which there was no reply from the respondent. Hence this petition.

4. Factual matrix reveals that the petitioner was, initially, engaged as clearing, forwarding agent by the respondent company; and thereafter his status was changed and came to be appointed as a Clearing and Forwarding Agent (CFA). The alleged recovery against the respondent as per petition is on account of clearing and forwarding agency transactions. The contention of the petitioner in the petition, is that the debt is not in dispute. The respondent has failed to pay the same inspite of demand through statutory notice hence respondent company should be presumed to be not in a position to discharge it's liability warranting an order of winding up.

5. On being noticed, the respondent company appeared and filed their counter affidavit contending therein that they have a claim against the petitioner which runs into more

than a crore. The details of which are given in para 8 of the counter affidavit.

6. It is also brought on record that the parties to the petition are already engaged in the arbitration proceedings with respect to their rival claims arising from the clearing and forwarding agency business.

7. The respondent has also brought on record that after giving credit of Rs.27,95,020/- the balance payable to the petitioner would be in the sum of Rs. 1,48,160/-. The details of which are also given in para 18 of the counter affidavit.

8. The respondent has claimed right of lien over the said amount of Rs. 1,48,160.10 since they themselves have to recover Rs. 2,09,86,467.44 from the petitioner. In nutshell, according to the respondent, the alleged debt is in dispute and the dispute between them is bona-fide.

9. The petitioner has filed an affidavit in rejoinder dated 22nd November, 2006 contending in para 17that calculations of the respondent given in counter affidavit show that an amount of Rs. 1,48,168.10 due and payable by the

respondent to the petitioner, is totally unrealistic and unjustifiable. According to the petitioner, claim to the extent of Rs. 29,43,188.10 has already been admitted by the respondent in their affidavit, as such to that extent there is neglect in payment of amount due and payable. Hence this petition needs to be admitted with further action in accordance with law.

Consideration :

10. Having heard rival parties, having examined the facts of the case, it would be proper to examine the settle legal position before embarking upon the rival contentions.

11. In the case of **C.A.Galiakhot & Co.Pvt.Ltd.**, 1984 55 Comp.Cases 746 (Bom), the learned single of this Court held as under:

> It has to be shown for the company's inability to pay its debts that the company has omitted to pay without reasonable excuse. The existence would clearly constitute reasonable excuse. The existence of valid commotes claims would clearly constitutes reasonable excuse for non-payment the word "neglect" has been defined in the companies act. However, judicial pronouncements have interpreted the word "neglected" to mean that if there is a refusal to pay without any reasonable cause then it could be a said that the company had neglected to pay the amount. The mere omission to pay is not a

neglect to pay. If the company bona fide disputes its liability to pay the amount, even though the amount may be decretal amount, then in that case it cannot be said that company has neglected to pay within the meaning of section 434(1)(a). It is all a question of fact as to whether the company has a bona fide dispute and is order to ascertain whether the company has a bona fide dispute to the amount claimed by the petitioning creditor, it would be necessary for the court to consider the facts and circumstances of each case and to come to a decision whether the company has a bona fide dispute to the claim of the petitioner. If there is a genuine cross-claim, then it amounts to this that the claim of the petitioner is a disputed claim and a disputed claim can never be a good subject- matter of a winding-up petition. If the company's claim "overtops" the claim of the petitioner, the petition must be dismissed.

12. It is now well settled that the winding up petition should not be allowed to be taken as a means to recover debt from the company. It is not a legitimate way to enforce payment of debts which are *bona fide* disputed by the company and cannot be used as a weapon to pressurise and coerce the company to make payments. But it is also equally well settled that when the debt is undisputed and the defence is not *bona fide* and genuine, the Court will not act upon a defence that the company has liability to pay but; chooses not to pay and the creditors will, in such case, be entitled to a winding up order. This legal position is reiterated by the Apex Court from

time to time. Readily available judgment is in the case of **Madhusudan Gordhandas and Co. v. Madhu Wollen Industries**, 1972 (42) Comp.Cases 125, wherein the Supreme Court observed that (headnote):

> "Where the petition for the winding up is based on the ground of inability of the company to pay its debts, it is well settled that if the debt is bona fide disputed and the defence is a substantial one, the court will not order winding up. The principles on which the court acts are first, that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and, thirdly, the company adduces prima facie proof of the facts on which the defence depends."

13. On the basis of the aforesaid admitted position, the question that falls for consideration is as to whether there is a bonafide dispute or in other words whether the company merely declines to pay without reason.

14. The necessary factual matrix can, thus, be summed up by stating that the petitioner was, initially, appointed as Consignment Agent under the agreement dated 12th February, 2001 and thereafter under a fresh agreement dated 5th February, 2003 petitioner came to be appointed as Clearing and Forwarding Agent of the respondent with effect from 1st February, 2003. It is not in dispute that the

respondents have set out a claim against the petitioner of their outstandings accumulated to the tune of Rs.1,24,00,000/- as on 13th January, 2003 and that the dispute with respect to the said amount is already a subject matter of the arbitration proceedings pending between the parties. Therefore, the contention of the respondent that in one account they have to recover huge amount from the company whereas in other account some amount is payable to them. In that view of the matter, respondent- company claims to have adjusted Rs.27,95,020/- as per Exh.10 annexed to their counter affidavit and they claim that they are entitled to retain the balance amount towards their outstanding dues. It is, thus, clear from the rival submissions that the petitioner is contending that the dealings under the Consignment Agreement and the C &F Agreement constitute two distinct and water tight compartments, whereas respondent is contending that dealings under the two are closely land inextricably intertwined. Alternatively, respondent- company has also claimed that they have right to claim adjustment relying on clause-35 of the agreement dated 5th April, 2004, copy of which is placed on record at Exh.4 to the counter affidavit. The said clause-35 reads as under:

> "If any damages are claimed by the Company, or if any money becomes due and payable by the CFA to the Company under this Agreement or arising out of the same, then the Company will have the right to set off the same against any other monies which the Company may have to pay the CFA under this Agreement or any other transaction or otherwise howsoever occasioned or incurred."

15. The question that falls for consideration is whether the respondent-company can claim right of adjustment on the basis of the document, viz., agreement dated 5th April, 2004, execution of which is not disputed. To put it differently, whether the claim of the respondent against the petitioner in the consignment agency account could be a legitimate ground to deny to petitioner payment, which the respondent has to make in respect of the transactions arising from the C and F agency business, on the basis of which present petition is filed. This very issue is answered by two judgments by two different High Courts. In the case of **Wimco Ltd. v. Sidvink Properties (P) Ltd.**, (1996) 86 Comp.Cases 610, the Delhi High Court opined that the counter claim of the respondent-company forms the basis of bona fide dispute with regard to its liability to pay the amount to the petitioner company. In another case, Division Bench of the Calcutta High Court in

J.N.Roy Chowdhury Traders (P.) Ltd. v. Jamti Enterprises, (1997) 61 Comp.Cases 504 observed as under:

> "In our opinion, the questions sought to be raised in the instant case are questions which, if established, may constitute a valid case for the company. Whether the company will succeed in establishing its case or not will naturally depend on the result of the suit. We are fully convinced that the petitioning-creditor's debt has been disputed bona fide and there is a prima facie case for the appellant's counter-claim. In view of such claims and cross-claims by the parties, we are of the opinion that the learned judge was not right in admitting the petition for winding up and in giving direction for advertisement.
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> As we are satisfied that the appellant has raised a bona fide counter-claim against the respondent and there is no neglect to pay the alleged debt of the petitioning-creditor, the winding up proceedings cannot be allowed to proceed....."

16. From the aforesaid, it is clear that the counter-claim or cross-claim can be entertained in a winding-up petition and, if it is found that prima facie, a genuine counter-claim is set up, then, the same can form the basis of bona fide dispute of the petitioner's debt; on the basis of which winding up petition is filed. When this is the legal position, application thereof to the facts of the case on hand would not pose any problem.

17. It is not in dispute that in order to enforce its claim, parties are already locked in the arbitration proceedings. The cross-claim of the respondent overtops the claim of the petitioner. The claim set up by the respondent is also a prima facie arguable claim.

18. In the aforesaid factual backdrop, I do not see that the claim of the petitioner is undisputed. In this view of the matter, this is not a fit case to invoke jurisdiction of this Court under section 434(1) of the Companies Act. Petition is, thus, dismissed in limine with no order as to costs.

(V.C.DAGA,J)